

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-60001-CR-COOKE/BROWN(s)(s)(s)(s)(s)

UNITED STATES OF AMERICA,

vs.

JOSE PADILLA,

Defendant,

MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT CONDUCT

Mr. Jose Padilla, through undersigned counsel, moves this Court to dismiss the indictment based on outrageous government conduct and in support thereof states:

BACKGROUND

Mr. Padilla was arrested on May 8, 2002, in Chicago O'Hare International Airport, as he stepped off an airplane from Zurich, Switzerland. The arrest was purportedly authorized by a material witness warrant issued by the United States District Court for the Southern District of New York in connection with the grand jury investigation into the terrorist attacks of September 11, 2001. Mr. Padilla was transported to New York where he was held in custody. He was appointed counsel, and a motion was filed to vacate the material witness warrant.

On June 9, 2002, President George W. Bush declared Mr. Padilla an "enemy combatant" and directed Secretary of Defense Donald H. Rumsfeld to take custody of Mr. Padilla from the Attorney General. Mr. Padilla was transferred to the Naval Consolidated

Brig at the Naval Weapons Station in Charleston, South Carolina (hereinafter “Naval Brig”), where he was denied all access to counsel. The government argued that Mr. Padilla should not be allowed to see a lawyer because he might pass illicit communications through his attorney. The government also asserted that allowing Mr. Padilla access to counsel or to learn that a court was hearing his case could provide him with the expectation that he would some day be released:

Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla ... Providing him access to counsel now ... would break – probably irreparably – the sense of dependency and trust that the interrogators are attempting to create.

Declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, sworn to January 9, 2003, p. 8, *available at* http://www.justicescholars.org/pegc/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf#search=%22%22Jacoby%20Declaration%22%22 (hereinafter “Jacoby Declaration”).

In an effort to gain Mr. Padilla’s “dependency and trust,” he was tortured for nearly the entire three years and eight months of his unlawful detention. The torture took myriad forms, each designed to cause pain, anguish, depression and, ultimately, the loss of will to live. The base ingredient in Mr. Padilla’s torture was stark isolation for a substantial portion of his captivity. For nearly two years – from June 9, 2002 until March 2, 2004, when the Department of Defense permitted Mr. Padilla to have contact with his lawyers – Mr. Padilla was in complete isolation. Even after he was permitted contact with counsel, his conditions of confinement remained essentially the same. He was kept in a unit comprising sixteen individual cells, eight on the upper level and eight on the lower level, where Mr. Padilla’s cell was located. No other cells in the unit were occupied. His cell was electronically

monitored twenty-four hours a day, eliminating the need for a guard to patrol his unit. His only contact with another person was when a guard would deliver and retrieve trays of food and when the government desired to interrogate him.

His isolation, furthermore, was aggravated by the efforts of his captors to maintain complete sensory deprivation. His tiny cell – nine feet by seven feet – had no view to the outside world. The door to his cell had a window, however, it was covered by a magnetic sticker, depriving Mr. Padilla of even a view into the hallway and adjacent common areas of his unit. He was not given a clock or a watch and for most of the time of his captivity, he was unaware whether it was day or night, or what time of year or day it was.

In addition to his extreme isolation, Mr. Padilla was also viciously deprived of sleep. This sleep deprivation was achieved in a variety of ways. For a substantial period of his captivity, Mr. Padilla's cell contained only a steel bunk with no mattress. The pain and discomfort of sleeping on a cold, steel bunk made it impossible for him to sleep. Mr. Padilla was not given a mattress until the tail end of his captivity. Mr. Padilla's captors did not solely rely on the inhumane conditions of his living arrangements to deprive him of regular sleep. A number of ruses were employed to keep Mr. Padilla from getting necessary sleep and rest. One of the tactics his captors employed was the creation of loud noises near and around his cell to interrupt any rest Mr. Padilla could manage on his steel bunk. As Mr. Padilla was attempting to sleep, the cell doors adjacent to his cell would be electronically opened, resulting in a loud clank, only to be immediately slammed shut. Other times, his captors would bang the walls and cell bars creating loud startling noises. These disruptions would occur throughout the night and cease only in the morning, when Mr. Padilla's interrogations would begin.

Efforts to manipulate Mr. Padilla and break his will also took the form of the denial of the few benefits he possessed in his cell. For a long time Mr. Padilla had no reading materials, access to any media, radio or television, and the only thing he possessed in his room was a mirror. The mirror was abruptly taken away, leaving Mr. Padilla with even less sensory stimulus. Also, at different points in his confinement Mr. Padilla would be given some comforts, like a pillow or a sheet, only to have them taken away arbitrarily. He was never given any regular recreation time. Often, when he was brought outside for some exercise, it was done at night, depriving Mr. Padilla of sunlight for many months at a time. The disorientation Mr. Padilla experienced due to not seeing the sun and having no view on the outside world was exacerbated by his captors' practice of turning on extremely bright lights in his cell or imposing complete darkness for durations of twenty-four hours, or more.

Mr. Padilla's dehumanization at the hands of his captors also took more sinister forms. Mr. Padilla was often put in stress positions for hours at a time. He would be shackled and manacled, with a belly chain, for hours in his cell. Noxious fumes would be introduced to his room causing his eyes and nose to run. The temperature of his cell would be manipulated, making his cell extremely cold for long stretches of time. Mr. Padilla was denied even the smallest, and most personal shreds of human dignity by being deprived of showering for weeks at a time, yet having to endure forced grooming at the whim of his captors.

A substantial quantum of torture endured by Mr. Padilla came at the hands of his interrogators. In an effort to disorient Mr. Padilla, his captors would deceive him about his location and who his interrogators actually were. Mr. Padilla was threatened with being forcibly removed from the United States to another country, including U.S. Naval Base at Guantanamo Bay, Cuba, where he was threatened his fate would be even worse than in

the Naval Brig. He was threatened with being cut with a knife and having alcohol poured on the wounds. He was also threatened with imminent execution. He was hooded and forced to stand in stress positions for long durations of time. He was forced to endure exceedingly long interrogation sessions, without adequate sleep, wherein he would be confronted with false information, scenarios, and documents to further disorient him. Often he had to endure multiple interrogators who would scream, shake, and otherwise assault Mr. Padilla. Additionally, Mr. Padilla was given drugs against his will, believed to be some form of lysergic acid diethylamide (LSD) or phencyclidine (PCP), to act as a sort of truth serum during his interrogations.

Throughout most of the time Mr. Padilla was held captive in the Naval Brig he had no contact with the outside world. In March 2004, one year and eight months after arriving in the Naval Brig, Mr. Padilla was permitted his first contact with his attorneys. Even thereafter, although Mr. Padilla had access to counsel, and thereby some contact with the outside world, those visits were extremely limited and restricted. Significantly though, it was not until Mr. Padilla was permitted to visit with counsel that one of his attorneys, Andrew Patel, was able to provide Mr. Padilla with a copy of the Qur'an. Up until that time, for a period of almost two years, Mr. Padilla was the right to exercise his religious beliefs.

The deprivations, physical abuse, and other forms of inhumane treatment visited upon Mr. Padilla caused serious medical problems that were not adequately addressed. Apart from the psychological damage done to Mr. Padilla, there were numerous health problems brought on by the conditions of his captivity. Mr. Padilla frequently experienced cardiothoracic difficulties while sleeping, or attempting to fall asleep, including a heavy pressure on his chest and an inability to breath or move his body.

In one incident Mr. Padilla felt a burning sensation pulsing through his chest. He requested medical care but was given no relief. Toward the end of his captivity, Mr. Padilla experienced swelling and pressure in his chest and arms. He was administered an electrocardiogram, and given medication. However, Mr. Padilla ceased taking the medicine when it caused him respiratory congestion. Although Mr. Padilla was given medication in this instance, he was often denied medication for pain relief. The strain brought on by being placed in stress positions caused Mr. Padilla great discomfort and agony. Many times he requested some form of pain relief but was denied by the guards.

The cause of some of the medical problems experienced by Mr. Padilla is obvious. Being cramped in a tiny cell with little or no opportunity for recreation and enduring stress positions and shackling for hours caused great pain and discomfort. It is unclear, though, whether Mr. Padilla's cardiothoracic problems were a symptom of the stress he endured in captivity, or a side effect from one of the drugs involuntarily induced into Mr. Padilla's system in the Naval Brig. In either event, the strategically applied measures suffered by Mr. Padilla at the hands of the government caused him both physical and psychological pain and agony.

It is worth noting that throughout his captivity, none of the restrictive and inhumane conditions visited upon Mr. Padilla were brought on by his behavior or by any actions on his part. There were no incidents of Mr. Padilla violating any regulation of the Naval Brig or taking any aggressive action towards any of his captors. Mr. Padilla has always been peaceful and compliant with his captors. He was, and remains to the time of this filing, docile and resigned – a model detainee.

Mr. Padilla also wants to make clear that the deprivation described above did abate somewhat once counsel began negotiating with the officials of the Naval Brig for the

improvements of his conditions. Toward the end of Mr. Padilla's captivity in the Naval Brig he was provided reading materials and some other more humane treatment. However, despite some improvement in Mr. Padilla's living conditions, the interrogations and torture continued even after the visits with counsel commenced.

In sum, many of the conditions Mr. Padilla experienced were inhumane and caused him great physical and psychological pain and anguish. Other deprivations experienced by Mr. Padilla, taken in isolation, are merely cruel and some, merely petty. However, it is important to recognize that all of the deprivations and assaults recounted above were employed in concert in a calculated manner to cause him maximum anguish. It is also extremely important to note that the torturous acts visited upon Mr. Padilla were done over the course almost the entire three years and seven months of his captivity in the Naval Brig. For most of one thousand three hundred and seven days, Mr. Padilla was tortured by the United States government without cause or justification. Mr. Padilla's treatment at the hands of the United States government is shocking to even the most hardened conscience, and such outrageous conduct on the part of the government divests it of jurisdiction, under the Due Process clause of the Fifth Amendment, to prosecute Mr. Padilla in the instant matter.

ARGUMENT

A. Introduction

"Whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you."

Friedrich Nietzsche, *Beyond Good and Evil* 89 (Walter Kaufmann trans., Vintage Books 1966) (1886).

In the instant motion Mr. Padilla respectfully asserts that the charges against him should be dismissed by this Court. In so urging, he is fully cognizant that motions to dismiss premised upon outrageous government conduct are rarely justified, and thus rarely granted. *United States v. Pemberton*, 853 F.2d 730, 735 (9th Cir. 1988) (per curium). He is also aware that the relief he requests is extraordinary and the dismissal of his indictment would be seen in certain quarters as a calamity. However, Mr. Padilla is steadfast in his assertion that in a Nation of laws and of respect for the dignity of all persons, his prosecution is an abomination. The treatment of Mr. Padilla, a natural born citizen of the United States, is a blot on this nation's character, shameful in its disrespect for the rule of law, and should never be repeated. As such, the government's myriad and sundry due process violations visited upon Mr. Padilla have divested it of jurisdiction to prosecute him in the instant matter.

B. Outrageous Government Conduct

Mr. Padilla seeks to dismiss the indictment lodged against him based on the government's outrageous conduct in bringing him to court. The doctrinal origins of this motion are found in the dicta of a decision authored by then-Justice Rehnquist: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction ..."
United States v. Russell, 411 U.S. 423, 431-32 (1973). The *Russell* majority indicated that governmental conduct would be constitutionally impermissible only where it went beyond "that 'fundamental fairness, shocking to the universal sense of justice' mandated by the Due Process Clause of the Fifth Amendment." *Id.* (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

C. Shocks the Conscience

A number of courts have read the Supreme Court's warning in *Russell* to confine the broad due process check on the conduct of law enforcement officers only to that small category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant. See *United States v. Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir. 1983) (per curiam) (citing cases) (reversing district court dismissal for outrageous conduct in government sting of public officials). This articulation of what constitutes outrageous government behavior relies on the *Russell* Court's citation to *Rochin v. California*, 342 U.S. 165 (1952), as an example of the type of government activity that would so "shock the conscience" that it would violate due process. 411 U.S. at 432. In *Rochin*, police officers broke into the defendant's bedroom and unsuccessfully attempted to prevent the defendant from swallowing contraband drug capsules. The police took the defendant to the hospital where doctors forcibly pumped his stomach to retrieve the capsules. 342 U.S. at 166. The Supreme Court held:

[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – as this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172.

The Supreme Court has consistently held that due process is offended when government conduct is so egregious that it "shocks the conscience" and violates the "decencies of civilized conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) quoting *Rochin*, 342 U.S. at 172-73. According to the Supreme Court, the due process

guarantees of the Constitution were intended to prevent government officials “from abusing [their] power, or employing it as an instrument of oppression.” *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989) and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

The Eleventh Circuit recognized in *United States v. Edenfield*, 995 F.2d 197 (11th Cir. 1993), that even in the investigative or pre-indictment stage of a case, government misconduct could violate “that fundamental fairness, shocking to the universal sense of justice mandated by the due process clause of the fifth amendment.” *Id.* at 200 (quoting *United States v. Tobias*, 662 F.2d 381, 386-87 (5th Cir. Unit B 1981) and *Russell*, 411 U.S. at 432). In order to completely bar prosecution, government misconduct must be “outrageous.” *Edenfield*, 995 F.2d at 200. In evaluating the outrageousness of government misconduct, a court must look at the totality of the circumstances, with no single factor controlling. See *Tobias*, 662 F.2d at 387.

One example of outrageous government conduct meriting dismissal is found in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In *Toscanino*, the defendant was wanted on a narcotics warrant out of the Eastern District of New York. *Id.* at 268. The defendant was an Italian national living in Uruguay who had been abducted and forcibly brought to the United States to face prosecution. *Id.* The defendant maintained, both pretrial and after his conviction, that the entire prosecution against him was void due to the fact that the United States illegally kidnapped him from his home in Uruguay and tortured him during his transport to the United States. *Id.* at 269-70. The defendant’s motions to vacate his conviction and dismiss the indictment were denied without a hearing, and those denials were the sole issue on appeal. *Id.* at 271. The court remanded the case for an

evidentiary hearing to determine whether the defendant's claims of forcible abduction and torture could be sustained. *Id.* at 281.

In resolving the dispute, the *Toscanino* court had to reconcile long-standing Supreme Court precedent holding that the manner in which a defendant is brought to the territory of the United States was immaterial, and could not offend due process. See *Ker v. Illinois*, 119 U.S. 436, 444 (1866) (power of court to try defendant not impaired by the fact that he was forcibly abducted); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (due process merely requires the defendant's presence at the time of conviction after being apprised of the charges and after a constitutionally valid trial).

While acknowledging the continued validity of *Ker* and *Frisbie*, the court in *Toscanino*, held that intervening Supreme Court precedent had diluted their strict application. *Toscanino*, 500 F.2d at 874. The Court found that *Rochin's* holding, invalidating a state court conviction based on the brutal manner in which evidence had been extracted from the defendant, as well as the holding in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the Fourteenth Amendment's Due Process Clause applied the protections of the Fourth Amendment to defendants in state court proceedings, had eroded *Ker* and *Frisbie's* disinterest in the conduct of law enforcement in bringing a prosecution. *Toscanino*, 500 F.2d 273-74. These developments led the court to conclude that "due process ... now requir[es] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. See also *United States v. Orsini*, 402 F.Supp. 1218 (E.D.N.Y. 1975) (holding that defendant had met his burden of offering credible evidence of gross government misconduct in his seizure).

In ruling that the defendant's allegations of outrageous government conduct, if sustained on remand, should result in the dismissal of the indictment, the court in *Toscanino* noted that in many cases involving due process violations center on unlawful government acquisition of evidence and that, in those instances, the proper remedy would be the exclusion of the tainted evidence. *Id.* However, it noted that where suppression of the evidence would not suffice, the indictment should be dismissed so that the government would not benefit from its illegal conduct. *Id.* (citing *Won Sun v. United States*, 371 U.S. 471, 488 (1963)). Similarly, in the instant matter, the government has averred that it will not seek to introduce any evidence obtained from Mr. Padilla during his captivity in the Naval Brig. However, that remedy is clearly inadequate to make whole the prejudice suffered by Mr. Padilla at the hands of the government's gross misconduct.

D. Torture Shocks the Conscience

While the precise contours of what "shocks the conscience," can be difficult to delineate with certainty, there can be little doubt that the deliberate and repeated torture of an individual over the course of almost four years should and does shock even the most calloused conscience. "No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [appellant] shocks the conscience." *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000) (citing *Rochin*, 342 U.S. at 172); see also *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental"). Numerous cases illustrate the forgone conclusion that torture is precisely the sort of outrageous conduct that shocks the conscience. See *United States v. Havens*, 446 U.S. 620, 633 (1980) (Brennan, J. dissenting) (equating torture with conscience shocking behavior: "I still hope that the Court would not be prepared to

acquiesce in torture or other police conduct that ‘shocks the conscience’ even if it demonstrably advanced the factfinding process.”); cf. *United States v. Mitchell*, 957 F.2d 465, 470 n. 6 (7th Cir. 1992) (court’s conscience not shocked because “the conduct of the government ... clearly ... not comparable to official acts of torture, brutality or similar outrageous conduct present in cases where conduct was found to shock the conscience”); *United States v. Chin*, 934 F.2d 393, 399 (2d Cir. 1991) (sort of harm present in case can hardly be said to “shock the conscience” as would physical coercion or torture).

As stated recently by Judge Lee of the Eastern District of Virginia, torture is inimical to our system of justice and the judiciary should be a bulwark against the stain of torture in our criminal justice system:

[T]he Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings. This Court takes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the United States Constitution and of those international documents on human rights to which the United States is a signatory ... are upheld in word, deed, and spirit.

United States v. Abu Ali, 395 F.Supp. 2d 338, 379 (E.D.Va. 2005). While one can quibble about what behavior shocks the conscience, it is beyond debate that conduct amounting to torture clearly does so.

E. Torture

The definition of torture is somewhat elusive in that there is often disagreement as to what conduct reaches the level of torture as compared with that of more generalized abuse. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1695-96 (2005) (discussing disparate views of conduct in Abu Ghraib and general difficulty in pinning down objective criteria defining torture). Nevertheless, there are a number of sources supplying a definition of torture relevant to the consideration

of the instant motion. For instance, Congress has criminalized the commission of torture in several statutes. 18 U.S.C. § 2340, *et seq.* In those statutes, torture is defined as:

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
- (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340.

The United States has also entered into international agreements prohibiting torture. For instance, in 1984 the United Nations General Assembly adopted by consensus the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "CAT"). Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113. Torture is defined in Article 1 of the CAT as follows:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The United States Senate ratified the CAT subject to certain stated “understandings,” which include the following with respect to the meaning of torture:

(1)(a) That with reference to Article 1 [of the CAT], the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(1) the intentional infliction or threatened infliction of severe physical pain or suffering;

(2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) the threat of imminent death; or

(4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender’s custody or physical control.

Senate Resolution of Ratification of the Convention Against Torture, 136 Cong. Rec. 36,192, 36,198 (1990). Obviously, these elaborations on the CAT’s definition of torture track the definition of torture found in 18 U.S.C. § 2340.

Distilling these definitions, there is broad agreement that, at the very least, intentionally inflicting mental or physical pain is considered torture. This is particularly true if that infliction of pain is continued over a prolonged period of time. Perhaps more obvious is the fact that the threat of imminent death would clearly be torture. The United States Criminal Code also considers it torturous to administer or threaten to administer mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality. This prohibition is also found in the Senate’s elaborations of the CAT’s definition of torture. As such, although there can be differences of opinion regarding the precise contours of torture, our nation’s laws, as well as common sense, can cabin certain conduct all but the most oblivious would consider torture.

F. Mr. Padilla was Tortured

Mr. Padilla's assertion that he was tortured is, by any definition, unassailable. Through a substantial portion of his detention in the Naval Brig, Mr. Padilla was subjected to prolonged and substantial physical and mental pain. He was assaulted, threatened with imminent death, and subjected to myriad other deprivations during his captivity at the Naval Brig. He was drugged and subjected to cruel interrogations. However, the most painful and damaging form of torture experienced by Mr. Padilla was the extreme isolation he was subject to, aggravated by the deprivation of sensory stimuli and sleep.

Extended periods of solitary confinement are the most severe deprivation of liberty – short of the death penalty – that the government can impose. More than a century ago, the Supreme Court recognized the extreme implications that accompany solitary confinement. In considering a habeas corpus action by a prisoner sentenced to death, the Court held that the Colorado state court had violated the Ex Post Facto Clause when it ordered the imposition of solitary confinement on the petitioner pending the death sentence because the enacting legislation enabling the imposition of solitary confinement was passed after the criminal act was committed. In doing so, the Court noted that solitary confinement had a checkered history in the United States, and that it had fallen out of favor in the mid-1800s due to the finding that:

a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168-70 (1890).

Modern medical and scientific research confirms the Supreme Court's turn-of-the-century observation that solitary confinement can result in severe psychiatric harm:

Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control. This response has been observed not only in the extreme case where a subject in a clinical setting is completely isolated in a dark soundproofed room or immersed in water, but in a variety of other contexts. For example, similar effects have been observed in hostages, prisoners of war, patients undergoing long-term immobilization in a hospital, and pilots flying long solo flights. While acute symptoms tend to subside after normal stimulation or conditions are returned, some people may sustain long-term effects ... There is also an ample and growing body of evidence that this phenomenon may occur among persons in solitary or segregated confinement – persons who are, by definition, subject to a significant degree of social isolation and reduced environmental stimulation.

Madrid v. Gomez, 889 F. Supp. 1146, 1230-1231 (N.D. Cal. 1995) (citing Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983)).

The effects of solitary confinement are exacerbated when combined with the deprivation of sensory stimuli and other aggravating factors. Dr. Donald O. Hebb of McGill University conducted some of the pioneering studies on the effects of isolation. Dr. Hebb focused on the effects of isolation and sensory deprivation upon human beings and found that such isolation, in combination with sleep deprivation and self-induced fatigue (through stress positions, etc.) formed a new torture paradigm, producing what was termed “disordered brain syndrome.”

The experiments of Hebb and others ... who have concerned themselves with “sensory deprivation,” have consisted of putting men into situations where they received no patterned input from their eyes and ears, and as little patterned input as possible from their skin receptors ... The subjects were deprived of opportunity for purposeful activity. All of their bodily needs were taken care of – food, fluids, rest, etc. Yet after a few hours the mental capacities of the participants began to go awry.

Lawrence E. Hinkle, Jr., *The Physiological State of the Interrogation Subject as it Affects Brain Function* in *The Manipulation of Human Behavior* 28-29 (Albert D. Biderman & Herbert Zimmer eds., 1961).

The Supreme Court recognized the deleterious effects of isolation well over a century ago. That wisdom has only been further bolstered by the study and experimentation of modern psychiatry. Even for brief durations, subjects exposed to extreme isolation suffer great mental pain. That pain is logically augmented when combined with severe deprivation of sleep and sensory stimuli. Given what is known about the effects of these methods of torture, it is unimaginable what pain Mr. Padilla experienced when he was exposed to these methods, and more, for one thousand three hundred and seven days.

The quantum of pain experienced by Mr. Padilla through isolation, sleep deprivation, and lack of sensory stimuli exceeds any definition of torture, and hence, should shock the conscience of all decent society. However, the government's treatment of Mr. Padilla also included the forced administration of drugs designed to alter his mind and disrupt his senses and personality. The prohibition against the administration of mind altering substances in our laws recognizes that such actions are an attack on an individual's bodily integrity and are indistinguishable from the stomach pumping that so shocked the Supreme Court's conscience some fifty-odd years ago in *Rochin*. See generally Linda M. Keller, *Is Truth Serum Torture?*, 20 Am. U. Int'l L. Rev. 521 (2005) (asserting that involuntary administration of substance designed to induce confession is a violation of national and international prohibitions against torture). The involuntary administration of mind-altering substances to Mr. Padilla is not only torture, but smacks of the sort of experimentation that

one would associate with the workings of a concentration camp. See Robert J. Lifton, *The Nazi Doctors* 269-302 (2d ed. 2000).

CONCLUSION

In closing, the following words of dissent have often been repeated in the recognition that we, as a Nation, ignore the government's violation of law at our peril:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In defending this Nation against the threat of terrorism it is neither necessary nor proper for our government to abandon the bedrock principles upon which this Nation was founded. All that is sacred in our national life is secured by the promise that this is a Nation of laws and not of men.

It cannot be disputed that Mr. Padilla was tortured for a period of over three years. The pain and anguish visited upon Mr. Padilla will continue to haunt him for the remainder of his life. The government's conduct vis-à-vis Mr. Padilla is a stain on this nation's character, and through its illegal conduct, the government has forfeited its right to prosecute Mr. Padilla in the instant matter. Mr. Padilla respectfully requests that this Court dismiss the indictment against him for the government's outrageous conduct and requests a hearing on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was delivered by U.S. mail this 4th day of October, 2006 to those individuals on the attached service list.

Orlando do Campo